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In the Supreme Court
of the
United States
October Term, 1923

WESTERN UNION TELEGRAPH COMPANY,
Petitioner

vs.

STATE OF GEORGIA
As Owner of Western & Atlantic Railroad
and
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY
As lessee operating said Railroad under the corporate name and style of
WESTERN & ATLANTIC RAILROAD
Respondents.

REPLY BRIEF FOR PETITIONER.

The topical arrangement of this brief follows that of Respondent to which it refers.

I.
Record Filed As Exhibit

A copy of the entire record was, prior to the filing of the petition for certiorari, filed in this Court under

a praecipe upon a writ of error in the same cause which had been docketed. The praecipe requests the Clerk of the Supreme Court of Georgia "to prepare forthwith a certified transcript of the entire record in the above cause." The praecipe then specifies the entire record in detail. The record so filed will be taken as an exhibit to the petition for certiorari.

Security Trust Co. vs. Dent, 187 U. S. 237.

Montana Mining Co. vs. St. Louis Mining Co., 204 U. S. 204, 213.

II.

Public Interest.

The decree rendered in this cause, requiring the removal of all telegraph lines established and operated for about sixty (60) years from Atlanta to Chattanooga along the Western & Atlantic Railroad, affects matters of prime importance to the public and to the government.

(1) The transportation of messages both for the government and for the public as a common carrier.

Ratterman vs. W. U. T. Co., 127 U. S. 411, 425.

W. U. T. Co. vs. Wright, 185 Fed. 250, 251-4 (5 C. C. A.).

(2) The performance of the duties of an agency or instrumentality adopted by the government in carrying out the powers vested in Congress.

W. U. Tel. Co. vs. Texas, 105 U. S. 460, h. n. 1, 464.

U. S. vs. P. R. R. Co., 160 U. S. 1, 36, 39, 41, 43, 44, 45-47.

Mercantile Co. vs. Texas Pacific, 216 Fed. 225, 230.

Williams vs. Talledaga, 226 U. S. 404, h. n. 1 and 6, page 419.

(3) The destruction of the reserved right of the

government in the service of this line, and the termination of the reserved interest of the government in the property itself.

Chicago Ry. vs. U. S., 217 U. S. 180, h. n. 3 and pages 185-188.
U. P. R. R. Co. vs. Mason City, 199 U. S. 160, 165.
Essex vs. Telegraph Co., 239 U. S. 313, 321-322.
Lake Superior vs. U. S. 93 U. S. 442, 446.
Platt vs. Union Pacific, 99 U. S. 48, 57.
Van Dyke vs. Geary, 244 U. S. 39, 47.
Gibbs vs. Gas Co., 130 U. S. 396, 410.
Thomas vs. Railroad Co., 101 U. S. 71, 83.
Wisconsin R. R. vs. Forsythe, 159 U. S. 46, 55.

III.

Petition For Certiorari Presented in Time

A petition in due time was filed in the Supreme Court of Georgia for a rehearing of the cause.

On September 29th, 1923, the rehearing was denied by the Supreme Court of Georgia by the following language:

"Upon consideration of a motion for a re-hearing filed in this cause, it is ordered that it be hereby denied."

Time runs from the date of this order, September 29th, 1923.

Chicago Great Western R. R. Co. vs. Basham, 249 U. S. 164.
Citizens Bank vs. Opperman, 249 U. S. 448.
Andrews vs. Virginia Railway Co., 248 U. S. 272.

IV.

Constitutional Questions—"Full Faith and Credit," and Impairment of Contract Raised in Time.

The decisions and statutes of Tennessee were plead in the answer and in the amended answer in the trial

court. (Petition side pages 15, 17, 18, 24, 83, 93, 107 and 113.)

Impairment of contract was alleged in the original answer and amendment. (Petition side pages 20, 86-89, 99, 102-107, 111, 114.)

On motion of these respondents the trial court struck these allegations of unconstitutionality. (Petition side pages 111, 116-117.)

Chief Justice Russell in his decision said:

> "The plaintiff in error seeks to draw a distinction between its right *in Tennessee* and those as related in the portion of its line in the State of Georgia, contending that, in any event, it cannot be deprived of its right to use that portion of the line of the Western & Atlantic Railroad which is *within the State of Tennessee.* The privilege of making surveys in Tennessee was conferred 'upon the State of Georgia.' Acts of Tennessee Jan. 24, 1838, Cobb's Digest p. 420. The right to construct *in Tennessee* was given to the 'State of Georgia to be enjoyed and exercised by that State.' Acts of Tennessee, February 3, 1848, Cobb's Digest p. 421. Thus it will be seen that the grant from the State of Tennessee to the State of Georgia was without words of limitation. This being so, the Telegraph Company will not be heard to question the capacity in which the State of Georgia acquired these powers from the State of Tennessee, and certainly *this court* will not supply words of limitation upon that capacity where none was demanded by our sister state. The State of Tennessee at least recognized that Georgia was building the road as a sovereign state and that it was to own the right of way acquired by it, with the permission of the sister state, in its sovereign capacity and for this reason we think the same rule which

had been applied as to the claim of right of way or easement or franchise by the plaintiff in error as to the portion of the line in Georgia is likewise applicable to Tennessee—for this reason we reject the argument that the *cases cited from several jurisdictions* to sustain the proposition that the building and operation of the Western & Atlantic Railroad altered the status of Georgia as a sovereign State and reduced her to the same position in regard to this enterprise as she would have occupied as an individual."

Again Chief Justice Russell in his decision said:

"The plaintiff in error could under no view of the evidence adduced have maintained its claim to a franchise as against the State of Georgia upon the ground of prescription, as it contended, under color of title and open, notorious peaceable, adverse possession for a period of seven years—conceding for the sake of argument that they were rightfully in possssion under some claim of right, there was not a sufficient length of time in which such possession existed as could ripen a prescriptive title. What we have said is upon the assumption that it be admitted that prescription can ripen against the sovereign State and that the statute of limitations can be applied to a commonwealth, neither of which we do admit. Of course any such proposition as that a sovereign State can be barred by the statute of limitations is denied by the well-known maxim *nullus tempus occurrit regi.*"

Justice Custer in his opinion said:

"Upon the question as to whether or not prescription would ripen against the State, or the lapse of time could be made the basis of prescription, or as to whether the State lost its right to assert title to any part of its right of way by laches, we concur

in the ruling made by the members of the court in favor of affirmance, but not in all that is said by them in the discussion of the question."

A violation of the Constitution of the United States was generally alleged in paragraph 6 of the answer (petition side page 99), and quite particularly as to impairment of contracts and due process of law (side pages 104-106).

The full faith and credit clause of the Constitution was not in terms specified, but pleading the Tennessee decisions and statutes in the answer in the trial court and claiming the benefit thereof, with the further claim that the Constitution of the United States would be violated if the relief sought by the State of Georgia and its lessee were granted, inevitably invoked the applicable provision of the Constitution of the United States—the full faith and credit clause. Under the uniform decisions of this court these constitutional questions were sufficiently raised in the trial court, not only as to due process of law and impairment of contracts, but as to the full faith and credit to be accorded the Tennessee decisions and statutes.

Bridge Proprietors vs. Hoboken, 1 Wall. 116, 142, 143.

Rogers vs. Alabama, 192 U. S. 226, 230, 231.

Yazoo & M. Ry. Co. vs. Adams, 180 U. S. 1, 14-15.

Complaints that the Court in charging the jury did not charge as to the portion of the property in Tennessee in accordance with the laws of Tennessee is complained of in grounds 90, 91 and 92 of the motion for new trial filed by this petitioner. Tennessee statutes and decisions were plead in defense. The Tennessee statutes and

decisions were stricken. Full faith and credit was not given thereto. The unconstitutionality of these rulings are raised in the record. The Supreme Court of Georgia, evinced by the opinions of its Justices evidently recognized these questions as open and decided them. Under these circumstances this Court will review the ruling of the Supreme Court of Georgia denying this petitioner the benefit of the statutes and decisions of the State of Tennessee "without inquiring whether its Federal character was adequately called to the attention of the State trial court."

Hill vs. Smith, 260 U. S. 592, h. n. 1.

The amendment to 237 of the Judicial Code of February 17, 1922, provides that in a suit involving the validity of a contract a change in the rule of construction is a ground for review "if said claim is *made* in said court at any time before said final judgment is entered and if the decision is against the claim so made." The record shows that the claim was *made* in the Supreme Court of Georgia before final judgment and the decision thereafter rendered is against that claim.

The petition for writ of error docketed in the above cause within about three pages of the end of the petition contains the statement that this claim, directed to the Justices of the Supreme Court of Georgia, was filed in that Court before final decision in conformity with, and to obtain the benefit of, the amendment of February 17, 1922, to section 237 of the Judicial Code. The accompanying assignment of error IV. contains like statements. The petition for writ of error with the assignments of error were presented to the Chief Justice of the Supreme Court of Georgia, who, by formal order, allowed a writ of error. We think these facts in the record conclusively show not only that the claim was

filed in the Supreme Court of Georgia, but that the claim was presented to, and called to the attention of, the Justices, who considered the same, though the final order refusing a rehearing does not refer to it.

V.

Questions ordinarily raised by writ of error are considered by this Court when the case is before it on petition for certiorari and vice versa.

Prudential Insurance Co. vs. Cheek, 259 U. S. 530, h. n. 6.

The amendment of February 17, 1922, to section 237 of the Judicial Code gives this court the same power and authority for review and determination as if the case had been brought up by writ of error.

VI.

Impairment of Contracts.

The contracts impaired were made in 1850, 1852 and 1870. The Georgia statute impairing the obligation of these contracts bears date November 30, 1915, clearly subsequent to the date of the contract.

The impairment is by statute. The decision of the Supreme Court enforces the impairment. See cases cited in our original brief side page 183-185.

In Martin vs. Broach, 6 Ga. 21, cited by respondents, the court referring to the Georgia constitutional provision said on page 27:

> "This clause does not require that the title should contain a synopsis of the law, but that the act should contain no matter variant from the title."

The grant of right of way for a telegraph company is not matter variant from the title of the Act of 1852 in-

corporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company.

VII.

Post Roads Act of 1866.

The Post Roads Act bears date July 24, 1866. The Western Union Telegraph Company acquired title June 12, 1866, by assignment and transfer of the above mentioned contracts of 1850 and 1852. See Exhibit N. to motion for new trial. The Western Union Telegraph Company accepted the benefits of the Post Roads Act June 5, 1867. Exhibit P. P. motion for new trial. Subsequently the Western Union Telegraph Company acquired title directly from the State in 1870. In addition to this the answer claims that the State of Georgia had a right of way for railroad purposes only; that the title to the land and all other use and easements remained in the original owner against whom, as well as against the State of Georgia, the Western Union Telegraph Company and its predecessors in title acquired prescriptive title to easements for telgraph lines which did not interfere with the easements of the State of Georgia for railroad purposes. See authorities above cited relating to the Post Roads Act under topic II.

VIII.

Action of Western & Atlantic Railroad Commission.

On this subject we call attention to our original brief side pages 184, 185 and 189-203, 212-215.

In connection with what is said in our original brief about the lack of due process of law because of denial of presumptions in favor of this petitioner under the rules of procedure of the State Court and the placing of the burden of proof on this petitioner in opposition to these rules, we call attention to Hill vs. Smith, 260 U. S. 592, h. n. 2.

> "A question of burden of proof may amount to a Federal question when intimately involving substantive rights in a Federal statute."

Respondents in the closing paragraph of this topic of their brief state that this petitioner has "had opportunity to be heard to assert his claims—in this litigation."

This petitioner asserted its claims in its answer and pleas both denying allegations of the petition and alleging matters in defense not shown in the petition. These defenses are summarized on side pages 14 to 25 of the petition, and more fully on side pages 81-116. These denials, and the matter alleged affirmatively in defense, were stricken on respondent's motion, and pertinent evidence mentioned in side pages 119 to 131 following the petition was excluded. These rulings were in contravention of the provisions of the Constitution of the United States, the opportunity to be heard and assert claims, if such it may be called, was a mere fleeting hope which vanished with its appearance.

IX.

Ownership of the Western & Atlantic Railroad by the State of Georgia.

Petitioner claims title to easements for its lines not only because of grants from the State of Georgia and occupancy under those grants, but it also claims title by adverse possession against the owners of the land and of every use therein other than an easement for railroad purposes, as well as title against the State of Georgia by reason of adverse possession. The statement to the opposite effect on page 18 of respondents' brief is erroneous as petitioner's answer and pleas in the trial court show.

The Georgia statutes authorized Georgia to acquire "right of way" for this railroad and provided for condemnation in the event right of way could not be acquired by agreement. Under both the Georgia and Tennessee decisions such right of way is a mere easement in land for railroad purposes, the title to the land itself and to every other use and easement remaining in the original land owner.

See W. U. T. Co. vs. N. C. & St. L. Ry., 237 S. W. Rep., page 64, (Tenn.) citing and following:

Railroad vs. Donovan, 104 Tenn. 465, 477,
Railroad Co. vs. Telfords Executors, 89 Tenn. 293,
A. C. L. R. R. Co. vs. Postal, 120 Ga. 268,
L. & N. R. R. Co. vs. Postal, 143 Ga. 331.

See also

Lockwood vs. Ohio River R. R. Co., 103 Fed. 243-5 (4 C. C. A.); Certiorari refused, 180 U. S. 637; Southern Penn. Co. vs. Calf Creek Co., 140 Fed. 507; 513, 516,
East Alabama Co. vs. Doe, 114 U. S. 340, 349, 352,
L. & N. R. R. Co. vs. Maxey, 139 Ga. 542 h. n. 1,
Williams vs. W. U. T. Co., 50 Wis. 71,
Central Ry. Co. vs. Standard Co., 144 Ga. 92, 94, 95,
B. & W. R. R. Co. vs. Waycross, 91 Ga. 573, 574, 576,
A. B. & A. Ry. Co. vs. Coffee County, 152 Ga. 432, 434,
Long vs. Faulkner, 151 Ga. 837,
Calcasieu Co. vs. Harris, 43 A. & E. R. R. Cases, 570.

W. U. T. Co. vs. Penn. R. R. Co., 195 U. S. 540, is not in point. The contract in that case, covenant 13, prohib-

ited an assignment of the contract; covenant 15 provided for rescission of the contract upon default; covenant 16 stipulated that the telegraph company would remove its poles and wires from the railroad property upon the termination of the agreement, and, upon its failure to remove the same the railroad company could do so at the expense of the telegraph company. The contract also stipulated that any easement previously acquired by the telegraph company "is hereby relinquished and abandoned and the rights and easements of the telegraph company —shall be such only as are granted by this agreement and shall cease with its termination." See pages 542, 543-544.

Respondents on page 20 of their brief apparently claim abortive condemnation proceedings instituted, but dismissed by this petitioner, estop it from claiming the title asserted in its answer and pleas in this cause.

Without full knowledge of the facts this petitioner sought to institute condemnation proceedings. It gave notice of its intention to condemn, appointed an assessor and called on the lessee of the State and on the State to appoint an assessor. The lessee and the State refused to appoint an assessor and, by temporary injunction, enjoined petitioner from proceeding with condemnation. That injunction is still in force, and the cause in which it was rendered is still pending. The condemnation proceedings have been dismissed by petitioner. These condemnation proceedings were instituted without full knowledge of the facts, which were very obscure, under a belief that that proceeding afforded a remedy which has proved to be no remedy whatever. The respondents have not been induced to change their position by the attempted condemnation, but on the contrary, refused to participate therein, rendered it nugatory, and their status to-day

is what it was prior to the institution of those proceedings. While these respondents were permitted to introduce evidence relative to those condemnation proceedings, this petitioner was denied the right to introduce evidence explanatory of the circumstances under which it sought to institute those proceedings, its purpose in so doing, and its lack of knowledge of the facts and of all of the facts, and showing the circumstances and conditions rendering full ascertainment of the facts even now a practical impossibility. See the following grounds of motion for new trial:

Testimony of G. W. E. Atkins, ground 26.

Testimony of Arthur Heyman, grounds 31, 33 and 34.

Report of Confederate Telegraph Co., ground 46.

Testimony of Hon. Page Morris (U. S. District Judge), ground 53.

Butler's Historical Book, ground 54.

Reid's Historical Book, ground 55.

Testimony of Atkins and Heyman, ground 52.

Notice from L. & N. R. R. Co., ground 32.

Testimony relating to condemnation proceedings and equity causes, explanatory of and qualifying evidence introduced by these respondents, grounds 27, 28, 29 and 30.

Not only should the foregoing evidence have been admitted by due process of law in rebuttal, explanation and qualification of evidence introduced by these respondents; but the testimony so excluded shows that there was no abandonment by the Western Union Telegraph Company of such title and right as it possessed and which it claims in the present suit; nor was this petitioner thereby estopped from asserting in this suit the claims and demands plead by it.

The applicable doctrine is stated and discussed in 2

Pomeroy's Equity (3rd Ed.), section 802-812 and particularly section 805. The position here taken by this petitioner is also fully sustained by the following decisions:

Under the Georgia statute a condemnation proceeding amounts to a compulsory sale of such interest only as the defendant possessed. Charleston Ry. vs. Hughes, 105 Ga. 1, 13.

The only question open for determination is the value of defendant's interest in the land. A. B. & A. R. R. Co. vs. Penny., 119 Ga. 479, 483.

Prior to award movant can dismiss without impairing its right to again institute such proceedings. Central Co. vs. Nolan, 135 Ga. 443.

Agreement for submission to arbitration prior to award is revocable by either party. Harrell vs. Terrell, 125 Ga. 379; Tobey vs. Bristol, 3 Story, 800, 823.

The attempted condemnation proceeding to obtain the equivalent of a quit claim is consistent with claim of title by condemnor and does not estop. San Francisco vs. Lawton, 79 Am. Dec. 187 (Field, afterward a Justice of this Court); Robertson vs. Pickerell, 109 U. S. 608, h. n. 6, 613, 614, 616, 617; Gwinn vs. Smith, 55 Ga. 145; Roberts vs. Devane, 129 Ga. 608.

The doctrine of election is inapplicable. Bierce vs. Hutchins, 205 U. S. 340, 346; Nauman vs. Bradshaw, 193 Fed. 354 (C. C. A.); Barnsdall vs. Waltemeyer, 142 Fed. 415, 420. (C. C. A.).

This petitioner had the right, without being estopped, to discontinue the first remedy and pursue another.

Standard Oil Co. vs. Hawkins, 74 Fed. 395 (C. C. A.); Union Central Life vs. Drake, 214 Fed. 536, 547-548 (C. C. A.); Bennecke vs. Insurance Company, 105 U. S. 355, 359.

The condemnation proceedings and any statements therein relied upon by respondents were but the assertion of a legal conclusion or opinion which does not estop. Sturm vs. Boker, 150 U. S. 336.

There being no intended deception or fraud, equitable estoppel does not result. Hobbs vs. McLean, 117 U. S. 580; Crary vs. Dye, 208 U. S. 521; Brant vs. Va. Coal Co., 93 U. S. 326, 335, 336.

There was no mutuality. These respondents not only did not consent to the condemnation proceedings, did not agree to a submission for award, but refused to appoint an assessor and enjoined the proceedings. No estoppel results. Merriam vs. Saalfield, 241 U. S. 28; Hughes vs. Trustee, 6 Peters, 383-4; Gaither vs. Gaither, 23 Ga. 521, 528.

These respondents did not rely on the representations or conduct in the condemnation proceedings, and did not change their conduct for the worse. Therefore estoppel does not result. Bybee vs. R. R. Co. 139 U. S. 681; Bloomfield vs. Charter Oak, 121 U. S. 135; Ketchum vs. Duncan, 96 U. S. 659, (h. n. 3), 666.

Even an express disclaimer, or admission of lack of title, does not estop, these respondents having been neither deceived or mislead thereby, nor having changed their position for the worse. Frith vs. Siler, 32 Ga. 665, h. n. 1; Cain vs. Busbee, 30 Ga. 714, h. n. 4; Rieves vs. Lamar, 94 Ga. 186.

A quasi-public corporation cannot estop itself from performance of its duties. Union Pacific Ry. vs. Chicago, 163 U. S. 581; Gibbs vs. Gas Co., 130 U. S. 369, 410.

The following are pertinent paragraphs of the Georgia Code of 1910.

No. 5737: Estoppel as to title to real estate. Where the estoppel relates to the title to real estate, the party claiming to have been influenced by the other's acts or declarations must not only be ignorant of the true title, but also of any convenient means of acquiring such knowledge. Where both parties have equal knowledge or equal means of obtaining the truth, there is no estoppel.

No. 5738: Equitable estoppel. In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury.

The opinions of the Justices of the Supreme Court of Georgia indicate clearly that they did not consider this petitioner estopped by the condemnation proceedings which it sought to institute.

Respectfully submitted,

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Service of the foregoing brief acknowledged. Copy received, this January 17, 1924.

Attorneys for Respondents.